**STATE OF ILLINOIS**
**ILLINOIS COMMERCE COMMISSION**

| | | |
|---|---|---|
| **TDS Metrocom, LLC,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **Illinois Bell Telephone Company** | ) | **Docket No. 03-0553** |
| | ) | |
| **Complaint concerning imposition of** | ) | |
| **unreasonable and anti-competitive termination** | ) | |
| **charges by Illinois Bell Telephone Company.** | ) | |

# SUMMARY OF POSITION OF TDS METROCOM, LLC

**Peter R. Healy**
**Manager CLEC External Relations**
**TDS Metrocom, LLC**
**525 Junction Road, Suite 6000**
**Madison, Wisconsin 53717**
**(608) 664-4117**
**peter.healy@tdsmetro.com**

**Owen E. MacBride**
**6600 Sears Tower**
**Chicago, Illinois 60606**
**(312) 258-5680**
**omacbride@schiffhardin.com**

**July 2, 2004**

**TABLE OF CONTENTS**

| | | |
|---|---|---|
| **I.** | **DESCRIPTION OF TDS METROCOM** | **1** |
| **II.** | **TERMINATION CHARGE METHODOLOGY** | **1** |
| | A. TDS Metrocom's Complaint | 1 |
| | B. TDS Metrocom's Evidence Concerning SBC's Termination Liability Provisions | 5 |
| | C. TDS Metrocom's Position That SBC'S Termination Liability Provisions Are Unreasonable and Anticompetitive | 8 |
| | D. TDS Metrocom's Response to SBC's Arguments Concerning Termination Charges | 15 |
| **III.** | **STAFF'S RULEMAKING PROPOSAL** | **18** |
| **IV.** | **CALCULATION OF TERMINATION CHARGES BY SBC FOR CLECS** | **20** |
| **V.** | **TDS METROCOM'S REQUEST FOR REIMBURSEMENT OF FEES AND EXPENSES** | **27** |
| **VI.** | **PROPOSED FINDINGS AND ORDERING PARAGRAPHS** | **34** |

TDS Metrocom, LLC ("TDS Metrocom") submits this summary of its evidence and arguments for the use of the Administrative Law Judge in preparing a proposed order in this docket. As used herein, "SBC" or "SBC Illinois" refers to respondent Illinois Bell Telephone Company, and "Staff" refers to the Commission Staff.

## I. DESCRIPTION OF TDS METROCOM

TDS Metrocom is a CLEC providing local exchange telecommunications services to residential and business customers in Illinois. As of October 31, 2003, TDS Metrocom was serving approximately 22,600 access lines in Illinois, of which approximately 13,400 were business access lines. TDS Metrocom has invested over $30 million in its Illinois CLEC operations and has installed its own switch in Illinois and collocated in various SBC Illinois central offices. The principal areas in which TDS Metrocom is offering local exchange services are the Rockford area, Lake County and northern and northwestern Cook County. (TDS Metrocom Ex. 1.0, pp. 1-2)

## II. TERMINATION CHARGE METHODOLOGY

### A. TDS Metrocom's Complaint

TDS Metrocom states that it filed its Complaint in this proceeding as a result of finding several prospective business customers that had signed multi-year contracts with SBC Illinois for Usage and/or Centrex services containing termination liability provisions requiring the customer to pay all or a substantial percentage of the annual revenue commitment (or monthly charges) specified in the contract for the remainder of the contract term should the customer elect to terminate the contract to take service from a competitive provider such as TDS Metrocom. TDS Metrocom further states that upon being authorized by these customers to request from SBC calculations of the customers' termination liabilities, it learned that the amounts of the termination charges that would be imposed were these customers to switch to TDS Metrocom were substantial. Specifically, one customer that had two 36-month contracts with approximately 23 months remaining faced about $167,000 in termination charges; a second customer with nine months remaining on a 36-month contract faced about $26,000 in termination charges; and a third customer with 32 months remaining on a 36-month contract faced termination charges of about $63,000. TDS Metrocom states that the percentage of the annual revenue commitment (or monthly charges) used to determine the termination liability in these contracts were 100% and 85% in the first customer's two contracts, 100% in the second customer's contract and 50% in the third customer's contract. TDS Metrocom states that none of the customers elected to switch from SBC. (TDS Initial Br., pp. 5-6) The facts pertaining to the specific customer situations encountered by TDS Metrocom are set forth in paragraphs 13-30 of the Complaint, the attachments to the Complaint, and the direct testimony of Jennifer Stearns, TDS Metrocom's Manager-Commercial Market Development (TDS Metrocom Ex. 2.0).

TDS Metrocom's Complaint alleges that the practices reflected in the termination liability provisions of the SBC multi-year contracts are unjust and unreasonable and should be declared unjust and unreasonable by the Commission pursuant to Section 9-250 of the Public Utilities Act ("PUA"), 220 ILCS 5/9-250. The Complaint also alleges that these termination liability provisions are anticompetitive and impede the development of competition in local telecommunications services markets in Illinois, in violation of Section 13-514 of the PUA, 220 ILCS 5/13-514. The Complaint states that the termination liability provisions TDS Metrocom encountered were unreasonable, anticompetitive and an impediment to development of the competitive local exchange market because they require the customer to pay termination charges bearing no reasonable relationship to the loss or damage that SBC would experience if the customer terminated its contract, and have no purpose other than to lock up business customers for multi-year periods. (Complaint, ¶35-37; TDS Initial Br., pp. 6-7) The Complaint alleges, and TDS Metrocom argues, that in its *ASCENT* Order (*Association of Communications Enterprises v. Ameritech Illinois, Inc.*, Docket 00-0024, Order on Rehearing issued Feb. 24, 2002), the Commission found termination charge provisions similar to those that TDS Metrocom encountered, *i.e.*, termination liability provisions requiring the customer to pay all or a substantial percentage of the annual revenue commitment specified in the term calling plan for the remainder of the term, to be unjust, unreasonable, and an impediment to the development of competition. (Complaint, ¶10-11; TDS Initial Br., p. 7) Further, the Complaint alleges, and TDS Metrocom argues, that based on TDS Metrocom's experience in attempting to market its services to these and other customers, and the fact that these customers' contracts were "form" contracts of SBC, it was likely that SBC Illinois had entered into many other multi-year contracts with business customers containing such termination liability provisions. (Complaint, ¶31-32; TDS Initial Br., p. 7)

In its Complaint and in its briefs, TDS Metrocom argues that SBC's termination charge provisions in its multi-year business contracts are contrary to the principles articulated by the Commission in the *ASCENT* Case. TDS Metrocom contends that SBC Illinois should be required to adopt the form of termination liability provision for multi-year service contracts and tariffed calling plans for business customers that the Commission ordered in the *ASCENT* Case, under which a customer seeking early termination of a discounted multi-year contract or calling plan would be required to pay to SBC the difference between (i) the discounts the customer received under the contract and (ii) the discounts the customer would have received under a contract or calling plan having the duration of the term that the customer actually completed.

TDS Metrocom states that the *ASCENT* Case involved a complaint against SBC Illinois (then Ameritech Illinois) complaining of Ameritech's practice of requiring business customers electing service under certain multi-year calling plans to pay Ameritech the remaining amount of the customer's minimum annual revenue commitment for the balance of the contract term should the customer terminate service prior to the end of the term. As described by TDS Metrocom, the complainant there alleged that this practice had a significant anticompetitive impact on CLECs because customers in the small to medium size commercial market cannot afford to absorb the termination charges associated with switching service from Ameritech to a competitive telecommunications carrier. The complainant asserted that these termination charges impeded the development of competition because they were so high as to constitute a penalty, thus locking in potential customers of CLECs to long-term commitments to SBC Illinois. (TDS Initial Br., pp. 7-8)

TDS Metrocom states that in the *ASCENT* Order, the Commission concluded that SBC's termination charges were unreasonable and bore no reasonable relationship to the damages SBC would suffer if a customer terminated a term contract prior to its expiration. TDS Metrocom points out that the Commission stated in the *ASCENT* Order: "When a termination penalty for telecommunications services consists of the full minimum revenue contemplated by the agreement, it inherently exceeds actual damages", and noted that whatever SBC's actual damage may be when the agreement is terminated, it is something less than expected revenue, since the subject services cost something to provide. (*ASCENT* Order, p. 17) The Commission also concluded that both the intention and primary effect of these termination penalties has been to lock customers away from emerging competition. (*Id*., p. 16) Thus, the Commission concluded that the termination penalties complained of were unjust and unreasonable under Section 9-250 of the PUA, that the termination penalties "are unreasonable impediments to the development of competition", that the termination penalties "have a substantial adverse impact on the ability of the customers to choose, and alternative carriers to provide, telecommunications services", and that consequently the termination penalties were unlawful under Section 13-514 of the PUA. (*Id.*, pp. 17-18) The Commission therefore ordered SBC Illinois to cease imposing the termination penalties in question and to replace them with termination charges that allowed the customer to retain any discounts earned during the customer's term of service (i.e., prior to termination), but required the customer to pay SBC Illinois for any unearned discounts associated with the customer's term of service. (*Id.*, p. 29 and Finding (9))

### B. TDS Metrocom's Evidence Concerning SBC's Termination Liability Provisions

In addition to presenting evidence on the specific customer situations that were described in its Complaint and in the direct testimony of Ms. Stearns, which were the incidents that caused TDS Metrocom to file its Complaint, TDS Metrocom also presented evidence, based on information obtained through discovery in this case, on the extent to which SBC Illinois was utilizing contracts with termination liability provisions such as those TDS Metrocom had encountered prior to filing its Complaint. TDS Metrocom states that it requested copies of SBC's contracts with business customers in effect after January 1, 2002, with terms longer than 12 months and containing termination charge provisions, and that SBC Illinois responded that it had potentially thousands of such contracts. By agreement, SBC produced summary information on these types of contracts in effect during 2001, 2002 and 2003 and copies of representative contracts. The information provided indicated three categories of contracts by product/services types: (1) Centrex service contracts; (2) Usage Services, consisting of agreements for Access/Usage, Master Discount Agreements, NETSPAN and Toll/800 service; and (3) Data

Services/other, consisting of agreements for DS0, DS1, DS3, ISDN Prime, ISDN Direct Multi-Service Optical Networks, "Giga-MAN", SONET and Ameritech Digital Transport Service – Enhanced ("ADTSE"). TDS Metrocom states that the summary information indicated that SBC Illinois had hundreds of Centrex and Usage Services contracts and thousands of Data Services/other contracts in effect in these years. TDS Metrocom also states that the representative contracts provided by SBC included a number of multi-year (36 to 60 months) agreements for Usage Services with termination provisions similar to those described in the Complaint. Each of these agreements provides for a termination charge ranging from 50% to 100% of the customer's annual revenue commitment for the remaining term of the contract. (TDS Initial Br., pp. 9-10) TDS Metrocom witness Loch presented a summary of the termination charge per remaining year of the contract term for each of these ten representative Usage Services agreements, as follows (TDS Metrocom Ex. 1.0, p. 16):

| **Contract Number** | **Termination Charge per Remaining Year** |
|---|---|
| 20030507-0454 | $ 12,800 |
| 20000803-0314 | $ 75,000 |
| 19970117-0015 | $ 559,000 |
| 19980505-0002 | $ 277,500 |
| 19990104-0216* | $3,400,000 |
| 19990624-0045 | $ 25,000 |
| 19991220-0030 | $ 42,000 |
| 20010627-0309 | $ 50,750 |
| 20020125-0105 | $ 401,500 |
| 20021101-0341 | $ 25,100 |

*The termination liability is the net present value of the remaining Annual Commitment Level.

Mr. Loch testified that in addition to the representative Usage Services agreements, a number of the representative agreements for other types of services provided by SBC had termination liability provisions requiring payment of a high percentage of the customer's remaining obligation under the contract. He stated that there were at least 10 representative agreements for Centrex services that indicated that the termination charge would be 70% or more of the monthly charge for each month remaining under the agreement. The six representative GigaMAN service agreements specified termination charges of either 60% or 75% of the monthly charge for each month remaining in the term of the agreement. There were seven representative SONET contracts that specified termination charges equal to 50%, 60% or 70% of the remaining monthly charges or remaining recurring revenue under the agreement. Finally, Mr. Loch testified that virtually all of the representative contracts for DS0, DS1, DS3, ISDN Prime Service and ADTSE contained termination charge provisions specifying that the customer is responsible to pay SBC Illinois the difference between the amount of discounts actually received by the customer and the amount of discounts the customer would have received had it initially entered into a contract having a term equal to the period of service the customer actually completed before terminating the agreement, which is the form of termination liability provision specified in the *ASCENT* Order. (TDS Metrocom Ex. 1.0, pp. 19-20)

TDS Metrocom states that the summary information provided by SBC showed that in 2001, 2002 and 2003, it had hundreds of active "competitive contracts" for Usage Service, received only a very small number of requests for calculation of termination charges, and had none of these agreements terminated. Additionally, during these three years SBC received a very small number of requests for calculation of termination charges for Centrex Services agreements, and only a very few of these agreements were terminated. (TDS Initial Br., pp. 11-12)

Mr. Loch testified that three days before TDS Metrocom's direct testimony was due to be filed, SBC advised TDS Metrocom that SBC was revising its termination liability policies applicable to tariffed term plans and customer-specific agreements, both on a prospective basis for new contracts and retroactively for contracts already in effect, to the following: (1) For Centrex Services, 25% of the customer's remaining obligation under the tariff plan or agreement; (2) for Usage services, 35% of the customer's remaining obligation under the tariff plan or agreement; and (3) for all other services among those identified in SBC's discovery responses, 50% of the customer's remaining obligation under the tariff plan or agreement. (TDS Metrocom Ex. 1.0, p. 17; TDS Metrocom Ex. 1.4) Mr. Loch calculated what the termination charge (per remaining year of the contract term) would be for the ten representative Usage agreements under SBC's new policy. He testified that even at the reduced percentages, the resulting termination liabilities are still significant (TDS Metrocom Ex. 1.0, pp. 18-19):

| Contract Number | Termination Charge per Remaining Year |
|---|---|
| 20030507-0454 | $ 8,960 |
| 20000803-0314 | $ 26,250 |
| 19970117-0015 | $ 195,650 |
| 19980505-0002 | $ 129,500 |
| 19990104-0216* | $1,190,000 |
| 19990624-0045 | $ 8,750 |
| 19991220-0030 | $ 14,700 |
| 20010627-0309 | $ 17,762 |
| 20020125-0105 | $ 281,050 |
| 20021101-0341 | $ 17,570 |

*The termination liability is the net present value of the remaining Annual Commitment Level

### C. TDS Metrocom's Position That SBC Illinois' Termination Liability Provisions Are Unreasonable and Anticompetitive

TDS Metrocom contends that SBC's termination charges, even under its revised policies, are excessive, unreasonable and an impediment to competition. TDS Metrocom contends that because of the size of the termination charges they produce, SBC's termination provisions make it extremely difficult for a CLEC to persuade a customer that is otherwise interested in switching its service from SBC to the CLEC to in fact make the switch prior to expiration of the customer's multi-year contract with SBC. TDS Metrocom contends that from a customer perspective, the payment that must be made upon termination of the SBC contract is large in the absolute, and would tend to overwhelm any price savings or other benefits the customer would otherwise realize by switching from SBC Illinois to TDS Metrocom. TDS Metrocom further argues that in many cases the termination payment penalizes the customer by extracting an amount in excess of any actual benefit the customer received by virtue of the discounts under the agreement. The end result is that the customers that have entered into this type of contract are removed from the competitive marketplace and from the body of customers for which CLECs would otherwise be able to compete, by the requirement that the customer pay termination charges that are large and unreasonable. TDS Metrocom states that its experience with the customers it encountered in its marketing activities, and SBC's own data on the very small numbers of such contracts that have been terminated, demonstrates that SBC's termination charge provisions have provided a strong barrier to customer switching. (TDS Initial Br., pp. 13-14)

TDS Metrocom also points out that given the size of the termination charges, it is not practical for a CLEC to agree with the customer to pay some or all of the termination charge that the customer must pay SBC, because payment by the CLEC of all or a substantial portion of the customer's termination charge would be such a large customer acquisition cost that it would be difficult to justify financially acquiring the customer. TDS Metrocom also states that payment of the termination charge by the CLEC may still provide a windfall to SBC by allowing SBC to recover more than the excess discount that the customer received over and above what the customer would have received under a contract of shorter duration. TDS Metrocom concludes that SBC's termination liability provisions adversely impact CLECs' ability to compete with

SBC, because they unreasonably tie up with SBC, for multi-year periods, business customers that would otherwise be good prospects for CLECs. (TDS Initial Br., p. 14)

TDS Metrocom contends that SBC's termination liability provisions discussed in this case are unreasonable based on the principles articulated in the *ASCENT* Order. TDS Metrocom states that in the *ASCENT* Order the Commission ruled that termination charge provisions that require the customer to pay all or a substantial portion of the customer's remaining revenue commitment under the contract are unreasonable, and that a reasonable form of termination charge is one that requires the customer to pay SBC the difference between the discounts the customer actually received before termination and the discounts the customer would have received for a contract with the same length as the term the customer actually completed. TDS Metrocom states that the legal principles articulated and conclusions reached by the Commission in that case are applicable to multi-year contracts and calling plans generally, not just those involved in that case. Citing pages 15-25 of the *ASCENT* Order, TDS Metrocom states that those underlying legal principles are that to be reasonable, a termination charge provision, like a liquidated damages clause or a damages award for breach, must bear a reasonable relationship to any loss or damage the seller experiences as a result of the buyer's early termination, and should take into account the costs that the seller avoids by not having to perform the remainder of the contract term. The Commission pointed out in the *ASCENT* Order that both Restatement of Contracts §356 and 810 ILCS 5/2-718 (the Uniform Commercial Code) specify that damages for breach may be liquidated in an agreement but only at an amount that is reasonable in light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss; and that a contract provision fixing unreasonably large liquidated damages is void and unenforceable as a penalty. The Commission further stated that a termination liability provision that fixes unreasonably large liquidated damages for early termination must be considered unreasonable under Section 9-250 of the PUA. (TDS Initial Br., pp. 15-16)

TDS Metrocom states that in the *ASCENT* Order, the Commission satisfied itself that the termination charge provision it directed SBC to adopt, *i.e.*, requiring the customer to reimburse SBC for the difference between the discounts the customer actually received before termination and the discounts the customer would have received for a contract with the same length as the term the customer actually completed, meets the fundamental legal principles for determining a reasonable liquidated damages (termination liability) provision. As a result, TDS Metrocom's principal recommendation is that the Commission should require SBC to incorporate this form of termination liability provision into all of its multi-year contracts and tariffed plans for business customers for Usage Services, Centrex Services and Data Services. (TDS Initial Br., p. 16)

TDS Metrocom also states that under its proposal, if SBC incurred costs for special construction to serve the customer but waived the special construction charges (that the customer otherwise would have been required to pay) in consideration and anticipation of the customer entering into a long-term contract, or if SBC waived other "up front" charges in consideration of the customer entering into a term contract, such as service initiation or activation fees, SBC should be allowed to recoup such charges from a business customer that terminates its term contract or calling plan, in addition to receiving the termination charge resulting from the "give back the discount" calculation. TDS Metrocom acknowledges that recovery of such up-front charges is necessary to make SBC whole. (TDS Reply Br., p. 8)

TDS Metrocom states that during the course of this case, SBC Illinois announced revised termination charge policies, which represent an improvement over the SBC termination liability provisions generally in effect for Usage and Centrex services at the time TDS Metrocom's

Complaint was filed, in at least two respects. First, the revised termination liability policies are based on at least an attempt to identify the costs SBC saves or avoids in the event of early termination of a contract, and the actual loss or damage that SBC would experience due to early termination. Second, SBC's new termination liability provisions produce lower termination charges than its provisions previously in effect. TDS Metrocom states that reducing the termination charge percentage in a Usage Services Agreement from 100%, 75% or 50% of the customer's remaining obligation under the contract or tariff plan to 35% of the remaining obligation reduces the absolute size of the termination charge the customer would have to pay. (TDS Initial Br., p. 17)

However, TDS Metrocom continues to have concerns with SBC's revised policies. TDS Metrocom contends that even at the reduced percentages employed in SBC's revised policies, the customer's termination liability can still be a significant dollar amount. TDS Metrocom states that the termination charges under the revised SBC policy for the ten representative Usage Services agreements are still too high and will continue to significantly limit any switching by business customers taking service from SBC under term contracts and multi-year tariff plans. TDS Metrocom also points out that even though the amounts are reduced, the termination charges under SBC's revised policies continue to be based on charges for future services that SBC will never provide, rather than on return of the benefit the customer did not in fact earn from SBC. Additionally, TDS Metrocom notes that the percentages applied to the customer's remaining revenue commitment under SBC's new policies are intended to represent the annual revenue under the contract or tariff plan less SBC's saved costs if the contract is terminated and SBC no longer has to provide the service to the customer; thus, by stating that the termination liability should be 35% of remaining revenues for Usage Services, 25% of remaining revenues for Centrex Services, and 50% of remaining revenues for Data/Other Services, SBC is indicating that it has 35%, 25% and 50% profit margins, respectively, on long-term contracts and tariff plans for these service categories. TDS Metrocom states that such high profit margins, on contracts entered into at discounted prices, are inconsistent with SBC's assertions that the business telecommunications services market in its service area is highly competitive. TDS Metrocom states that either SBC's profit margins on long-term contracts and tariff plans for business customers are not as high as SBC has depicted, or the market is not very competitive. (TDS Initial Br., pp. 17-18)

In evaluating SBC's revised policies, TDS Metrocom contends that, as the Commission did in the *ASCENT* Case, the reasonableness of the termination liability provisions should be looked at from the perspectives of both the service provider and the customer. TDS Metrocom states that from the service provider (SBC's) point of view, reasonableness can be evaluated based on its lost revenues and avoided costs if the customer terminates the contract prior to expiration. In this case, SBC presented cost studies that purported to show its saved costs and lost profits if a business customer terminates a contract or term calling plan prior to expiration. However, with the exception of special construction charges and similar up-front charges that SBC may have waived in consideration of the customer entering into a multi-year contract, SBC's studies do not necessarily show that SBC's prospective lost revenues are any different if a business customer on a term contract terminates the contract than if a non-contract (i.e., month-to-month) customer for the same service switches to a CLEC rather than staying with SBC for the same time period. TDS Metrocom states that what SBC really loses if a customer terminates a term contract or calling plan is the benefit of its bargain to charge reduced rates in exchange for the customer's term commitment. TDS Metrocom states that the outcome of the *ASCENT* Order recognized that the "give back the discount" approach restores SBC to the position it would have been in if SBC and the customer had originally agreed to a contract or calling plan of the duration that the customer actually completed, with the associated pricing. TDS Metrocom therefore concludes that the "give back the discount approach" that the Commission directed in the *ASCENT* Order is reasonable and fair from SBC's viewpoint. TDS Metrocom states that from the customer's viewpoint, the "give back the discount" approach is reasonable too. The customer is not unjustly enriched by getting to keep discounts in excess of what the customer would have obtained had it originally entered into a contract or calling plan of the duration it actually completed. Rather, the customer only winds up with the discounts it would have received had it originally entered into a contract or calling plan of the duration it actually completed. Thus, the customer has not been subjected to unreasonably large liquidated damages. (TDS Reply Br., pp. 6-7) As a result, TDS Metrocom's primary recommendation continues to be that SBC should be required to adopt the "give back the discount" form of termination liability provision for multi-year contracts and calling plans for Usage, Centrex and Transport/Data/other services. (TDS Reply Br., p. 11)

TDS Metrocom's secondary recommendation, if the Commission decides to allow SBC to continue to use the "percent of remaining revenue" form of termination liability provision, is that the Commission should direct that the "percent of remaining revenues" percentages used in SBC's termination liability provisions should not exceed 25% for the termination charges for any of the three broad categories of services (Usage, Centrex and Data/Transport/other). TDS Metrocom states that the percentages of 35%, 25% and 50% that SBC is adopting in its revised policies for Usage, Centex and Data/Transport/other services, respectively, are too high because they reflect excessive, unreasonable and unlikely (for discounted prices in a purportedly competitive market) profit margins; and because they produce termination charges that are still so high in absolute amount as to present barriers to competitive switching. TDS Metrocom contends that in contrast, a "percent of remaining revenues" percentage of 25% will produce lower termination charges and constitute a more reasonable and realistic profit margin on these services. TDS Metrocom notes that its recommended maximum percentage of 25% is the percentage that SBC itself is applying for Centrex Services. (TDS Initial Br., p. 19; TDS Reply Br., pp. 12-13)

In summary, TDS Metrocom's recommendations with respect to SBC's termination liability provisions are as follows:

(1) SBC Illinois should be directed to immediately replace all contractual and tariffed termination liability provisions that require the customer to pay all or a portion of the customer's remaining minimum annual revenue commitment amount for the duration of the contract, with provisions calculating the customer's termination liability as the difference between the discount the customer received during its term of service and the discount the customer would have received had it initially entered into a contract or tariffed plan with a term equal to the customer's actual term of service. (TDS Initial Br., p. 3)

(2) Alternatively, if the Commission finds acceptable the new form of termination liability provision used by SBC Illinois (*i.e.*, a stated percentage of the customer's remaining revenue obligation under the contract or tariffed plan), the Commission should nonetheless find that the percentages adopted by SBC in its revised termination liability policies are excessive and unreasonable. The Commission should direct that the "percentage of remaining revenue" in SBC's multi-year contracts and tariffed calling plans for Usage, Centrex and Data services for business customers should not exceed 25%. (TDS Initial Br., p. 3)

**D. TDS Metrocom's Response to SBC's Arguments Concerning Termination Charges**

TDS Metrocom responded to SBC's argument that the "give back the discount" approach proposed by TDS Metrocom is actually more adverse to competition than SBC's revised policies because, according to SBC, the "give back the discount approach" produces a higher termination charge in approximately 60% of the months in a term contract. (SBC Initial Br., p. 18) TDS

Metrocom did not dispute that, as a general matter, in the early months of a term contract or calling plan, SBC's "percent of remaining revenues" approach will produce a higher termination charge than the "give back the discount" approach, while in the later months of the contract term the "give back the discount" approach will produce a higher termination charge. TDS Metrocom argued, however, that in terms of the impacts of termination liability provisions on the ability of SBC, the dominant provider, to tie up business customers for extended periods, on the ability of CLECs to compete for business customers and on the size of the available customer base for which CLECs can compete, and thus on the continuing development of a competitive market, it is the early years of a long-term contract that are critical. (TDS Reply Br., p. 6) TDS Metrocom cited the testimony of its Vice President-Sales, Mr. Loch, who testified:

> The "return the discount approach" advocated by TDS Metrocom (and specified by the Commission in the ASCENT decision) is more pro-competitive because it produces lower termination charges in the early years of the contract. It is in the early months of a long-term contract when the potential anticompetitive impacts of a termination charge in terms of discouraging the customer from considering other suppliers may be most pronounced, because the large termination charge at that point effectively locks up the customer with SBC for two or more years in to the future. In contrast, in the last few months of a customer's term contract, a potential new carrier may not be interested in trying to get the customer to terminate the contract and switch regardless of the termination charge – the new carrier can simply wait the relatively few remaining months until the existing contract expires, or even try to sign the customer to a new contract to go into effect when the customer's old contract expires. (TDS Metrocom Ex. 1.5, pp. 5-6)

TDS Metrocom states that this testimony refutes SBC's assertion, which was not supported by testimony, that "most competitors would focus their marketing efforts on customers as their contracts expired." (SBC Initial Br., p. 20) (TDS Reply Br., p. 7) TDS Metrocom also notes that (as SBC pointed out) a number of business customers roll off of their long-term SBC contracts or tariff plans each year and thus again become contestable by SBC's competitors; for this reason, there is no great incentive for a CLEC to seek to persuade an SBC customer to switch to the CLEC, by offering to reimburse the customer's termination charge, when the customer is within a few months of the expiration of its contract or calling plan. TDS Metrocom states that in contrast, if a large termination charge in the early years of an SBC term contract or calling plan effectively precludes a business customer that has signed a three-to-five-year contract with SBC from considering switching to a competitor until the latter part of the contract term (which would occur under SBC's revised termination liability provisions), that customer has been locked up by SBC, and locked away from competitors and the competitive market, for an extended time period. (TDS Reply Br., p. 7)

TDS Metrocom also responded to SBC's argument that there is no longer any reason for the Commission to specify the form of termination charge provision that SBC must use for business services because the market is much more competitive than it was at the time of the *ASCENT* Case. (SBC Initial Br., pp. 14-17) TDS Metrocom contends that the facts do not support SBC's argument. SBC's own evidence shows that SBC retains 65% of the business telecommunications market based on network access lines and usage. (*Id.*, pp. 15-16) TDS Metrocom states that while a 65% market share may look small to a company that was once a monopolist in the local service market, it remains huge from the perspective of SBC's competitors. TDS Metrocom contends a 65% market share in any industry would be viewed as giving the company that possessed that market share market power. TDS Metrocom also notes that the remaining 35% (according to SBC's figures) of the business market is divided up among numerous CLECs (79 according to SBC); thus, none of these CLECs has anywhere near the market share and market power that SBC continues to possess. TDS Metrocom contends that with SBC retaining 65% of the business telecommunications market, the available customer base for which CLECs may compete is necessarily small, and unreasonable termination charge provisions that allow SBC to lock up otherwise-available business customers for significant periods further shrink that available base of customers. Finally, TDS Metrocom states that the evidence shows that SBC has been extremely successful in this regard, as shown by the fact that in 2001-2003, SBC had hundreds of contracts for Usage services in effect, and none of these were terminated. (TDS Reply Br., pp. 9-10)

TDS Metrocom disputed SBC's suggestions that TDS Metrocom is recommending that SBC be ordered to use the "give back the discount" approach adopted in the *ASCENT* Order for all term contracts and tariffed calling plans for Usage, Centrex and Data/Transport/other services because that is the approach that TDS Metrocom uses. (SBC Initial Br., pp. 18, 19, 27) Rather, TDS Metrocom is recommending that SBC be required to use the "give back the discount" approach because it is the approach that the Commission already found to be reasonable, appropriate and pro-competitive in the *ASCENT* Order based on a though review of contract law principles and of the impacts on customers, competitors and the competitive market of the different approaches. TDS Metrocom states that SBC has not presented any evidence or argument to justify revisiting the conclusions or departing from the approach the Commission found to be reasonable and appropriate in the *ASCENT* Order. (TDS Reply Br., p. 10)

## III. STAFF'S RULEMAKING PROPOSAL

TDS Metrocom opposes Staff's primary recommendation, namely, that the Commission should initiate an industry-wide rulemaking on termination charges, for several reasons. First, TDS Metrocom notes that the Commission has already thoroughly reviewed, considered and applied the applicable legal and competitive principles in the *ASCENT* Order. TDS Metrocom states that there is no incremental benefit to revisiting these principles in a rulemaking proceeding. TDS Metrocom also notes that Staff concurred that the Commission's analysis, reasoning and method of calculating termination liabilities from the *ASCENT* Order are sound and could be applied to the SBC-provided services at issue in this complaint proceeding. (Staff Init. Br., p. 13) (TDS Reply Br., pp. 13-14)

Second, TDS Metrocom states that a rulemaking proceeding would require considerable time and resources from it and from other CLECs that participated in the rulemaking proceeding. TDS Metrocom reiterated that given the records that have been developed and the legal analysis that has been conducted in the *ASCENT* Case as well as in this docket, there is not an incremental benefit to be gained from a new rulemaking proceeding. TDS Metrocom also states that, at this time in particular, with significant increases in SBC's unbundled loop rates and related non-recurring charges having just been imposed by the Commission on facilities-based competitors such as TDS Metrocom, minimizing administrative and overhead costs is of great importance to CLECs as they try to stay cost-competitive so that they can remain in the Illinois market. (TDS Reply Br., p. 14)

Third, TDS Metrocom points out that it has a Complaint pending in this docket with specific relief requested, but that Staff's recommendation to initiate a rulemaking proceeding does not appear to be accompanied by a recommendation for specific action in this docket. TDS Metrocom states that the Commission must render a decision on the Complaint in this docket, and that the Commission's decision would seem to pre-ordain the outcome of any rulemaking proceeding. (TDS Reply Br., pp. 14-15)

Fourth, TDS Metrocom states that the history of recent lengthy Commission rulemakings would not bode well for a speedy resolution of a rulemaking proceeding on termination liability provisions. (TDS Reply Br., p. 15)

Finally, TDS Metrocom disputes any implication that a rulemaking is necessary because if SBC is required to use a particular form of termination liability provisions, all telecommunications carriers should be required employ the same termination liability provision. (See Staff Initial Br., pp. 14-15; see also SBC Initial Br., p. 27) TDS Metrocom contends that there are legitimate bases for the Commission to impose specific requirements and limitations on SBC with respect to the termination liability provisions it employs, but not on other CLECs. These reasons include SBC's market share, its legacy as the monopoly provider, and the market power that these characteristics impart. TDS Metrocom contends that so CLEC is comparable to SBC in these regards. (TDS Reply Br., p. 15)

## IV. CALCULATION OF TERMINATION CHARGES BY SBC FOR CLECS

TDS Metrocom requests that in its Order in this case, the Commission direct that for any multi-year contracts or tariffed plans with termination liability provisions, SBC should provide to a CLEC a calculation of the termination liability to which a business customer taking service under the contract or tariffed plan would be subject if the customer terminated the contract or plan, upon presentation by the CLEC of written authorization from the customer to request and receive the termination charge calculation. (TDS Initial Br., pp. 3-4) TDS Metrocom is requesting that the Commission extend the requirement it imposed on SBC in Finding (10) of the *ASCENT* Order:

> [C]alculation of a termination charge, pursuant to the formula described in Finding (9), should be performed by Ameritech upon termination of service by the customer or upon oral or written request from a customer, whichever occurs first; when such calculation is requested by a customer, it should be performed, and the results communicated to the customer, within three business days; the customer should be permitted to designate a telecommunications services provider as an agent for the purpose of requesting and receiving such calculation; in the event of a dispute with respect to such calculation, the burden of proving the correctness of the calculation should lie with Ameritech.

TDS Metrocom states that while the *ASCENT* Order required SBC to provide calculations of termination charges within three business days, it would be acceptable to TDS Metrocom if this time frame were lengthened to five business days/seven calendar days. (TDS Initial Br., p. 4)

TDS Metrocom states that subsequent to the *ASCENT* Order, SBC Illinois was (at least in TDS Metrocom's experience) routinely calculating customer termination charges for CLECs that presented written authorization from the customer to request and receive termination charge calculations. During the course of this docket, however, TDS Metrocom became aware that SBC had decided to cease providing termination charge calculations to CLECs (even with written authorization from the customer), except for the specific services that were the subject of the *ASCENT* Order. After TDS Metrocom raised this issue, SBC confirmed, in the Surrebuttal Testimony of Michelle Kent, that SBC previously had responded to all CLEC requests for termination charge calculations, regardless of the product or service, but that SBC had decided to "cut back on the scope of the calculations performed for CLECs to those specified by the *Ascent* Order (i.e., the ValueLink services)." (SBC Ex. 5.0, pp. 7-8) (TDS Initial Br., p. 20)

TDS Metrocom states that regardless of the conclusion the Commission reaches in this case on the substantive issue of the form of termination liability provision, the Commission should require SBC Illinois to continue to provide termination charge calculations to CLECs that present written authorization from the customer to request and receive this information from SBC. TDS Metrocom states that this is an extremely important competitive issue, because a CLEC has absolutely no chance to compete with SBC for the business of a customer that SBC has signed to a long-term contract if the CLEC cannot obtain timely termination charge calculations from SBC. TDS Metrocom states that the CLECs' inability to obtain timely termination charge calculations from SBC will only serve to exacerbate the impacts of SBC's multi-year contracts and tariff plans and the associated termination liability provisions in shrinking the size of the business telecommunications market for which CLECs can effectively compete with SBC. (TDS Initial Br., pp. 20-21)

TDS Metrocom questions how SBC can refuse at all to provide termination charge calculations to a CLEC (or to any third party) that presents written authorization from the customer to request and receive the termination charge information from SBC. If the customer appoints a CLEC (or other third party) as the customer's agent in this regard, by written document, SBC should have no basis to refuse to provide the requested termination charge information to the third party that is acting on the customer's behalf. (TDS Initial Br., p. 21)

TDS Metrocom noted that in Ms. Kent's Surrebuttal Testimony (SBC Ex. 5.0), SBC offered a number of reasons for no longer providing termination charge calculations to CLECs that present written authorization from the customer (other than for ValueLink services). TDS Metrocom contends that none of SBC's reasons justify SBC's drastic departure from the practice it previously followed.

TDS Metrocom contends that there are several problems with Ms. Kent's suggestions that a CLEC can always obtain termination charge calculations through the customer, because SBC will continue to provide termination charge calculations to the customer upon customer request, and that the CLEC should be able to calculate the termination charges itself, at least to a reasonable approximation, using the customer's contract documents. (SBC Ex. 5.0, pp. 8-10. First, the customer (particularly a busy small business customer) may simply fail to follow up to make or pursue the request with SBC. Second, although Ms. Kent elsewhere expressed concern about incorrect or unfocused termination charge requests received from CLECs, TDS Metrocom stated that a CLEC representative, whose job it is to understand telecommunications products and services and prices, terms and conditions, is in fact more likely to present an accurate, focused request to SBC. Third, TDS Metrocom stated that there is no substitute for an accurate calculation of the termination charge liability; both the customer and the CLEC will be frustrated and disappointed to calculate proposed pricing on the basis of an estimated termination liability to SBC, only to learn when the customer actually moves to terminate its SBC contract that the termination liability is in fact materially higher. Finally, TDS Metrocom states that the most problematic aspect, from a competitive perspective, of SBC's "have the customer ask" suggestion is that when the customer calls his SBC representative to request a calculation of his termination charges, the SBC representative is immediately given the opportunity to attempt to persuade the customer not to consider switching to the competitor. (TDS Initial Br., pp. 21-22)

Ms. Kent also expressed concern about the volume of termination charge calculation requests received and the fact that requests are received which are inaccurate or incomplete. (See SBC Ex. 5.0, pp. 4-7) In response, TDS Metrocom notes that it is SBC that has elected to lock up substantial numbers of business customers from competitors by signing these customers to multi-year service agreements with termination liability provisions; that requests from CLECs for termination charge calculations are a natural consequence of the business strategy that SBC has adopted; and that the volume of such requests is obviously directly correlated to SBC's success in signing large numbers of business customers to such contracts. TDS Metrocom further points out that the data provided by SBC in discovery on numbers of term contracts in effect and termination charge calculation requests received by SBC in 2001-2003 shows that the vast majority of termination charge calculation requests received by SBC in these years were for Data and other services contracts, with only a small number of such requests being received for Usage Services and Centrex Services contracts. TDS Metrocom states that not coincidentally, it is the Data/other services contracts in effect in these years that tended to incorporate termination charge provisions that SBC witness Ms. Kent characterized as presenting the more difficult type of calculation (SBC Ex. 5.0, p. 11), as opposed to the Usage Services and Centrex Services contracts that tended to use the "percent of remaining revenues" approach, which Ms. Kent described as "particularly straightforward" calculations. (*Id.*) TDS Metrocom states that this data belies Ms. Kent's claims that the customer and the CLEC should be able to calculate the termination charges themselves. To the contrary, SBC's own data indicates that most of the requests for termination charge calculations have occurred with respect to the contracts containing the more difficult-to-calculate termination charge provisions. (TDS Initial Br., p. 23)

TDS Metrocom also contends that the concerns expressed by SBC and Ms. Kent are based on SBC's experience under its previous, disparate termination liability provisions, and not under its new, more streamlined policies, and thus do not warrant SBC's actions in ceasing to provide termination charge calculations to customer-authorized CLECs. TDS Metrocom notes that SBC described its former termination liability policies as follows:

> Prior to the filing of TDS' complaint, the Company's tariffs and contracts contained termination liabilities that varied widely by product and service: some were "forward-looking" (i.e., the liability was based on a percentage of what was left on the contract), some were "backwards looking" (i.e., the liability was based on the savings the customer achieved for the contract period already completed) and the size of the liability differed widely. . . These differences did not reflect any economic or other differences between the products and services, but rather the accumulation of individual product managers' decisions over a long period of time. (SBC Initial Br., pp. 2-3; record citations omitted)

TDS Metrocom states that a large part of the time that SBC personnel were required to spend in calculating termination charges, according to Ms. Kent, was spent in figuring out SBC's own termination liability provisions and determining which one applied to the particular customer or contract. In contrast, whether the Commission in this case requires SBC to apply the "give back the discount" approach to all services, or allows SBC to continue to use its new termination liability policies, SBC will be operating, going forward, with a greatly reduced and simplified menu of termination charge provisions. Thus, SBC's experience under its previous, widely-varying termination liability provisions does not provide a good basis for justifying ceasing to provide termination charge calculations to customer-authorized CLECs. (TDS Reply Br., p. 17)

TDS Metrocom also points out that since SBC will continue to provide termination charge calculations directly to the customer, upon request, if one assumes that SBC will continue to get the same volume of requests directly from customers that it previously has received from customer-authorized CLECs, then the refusal to provide termination charge calculations to CLECs will not reduce the administrative burden of which SBC complains. TDS Metrocom therefore concludes that in adopting its new policy, SBC must have recognized that, as TDS Metrocom has argued, the customer is less likely to follow up and make the request for termination charge information than is the CLEC. TDS Metrocom states that this disproves SBC's assertion that there is no need for SBC to provide termination charges calculations to CLECs, because a CLEC can always ask the customer to make the request. Thus, the result of SBC's new policy of refusing to provide termination charge calculations to customer-authorized CLECs will be a reduced flow of competitively useful information to SBC's competitors. (TDS Reply Br., pp. 17-18)

TDS Metrocom contends that there are much less draconian ways for SBC to deal with the types of concerns it expressed about providing termination charge calculations than simply ceasing to provide termination charge calculations to CLECs acting as the customer's agent. For example, SBC could design a form or series of forms with information that SBC needs to calculate the requested termination charges, which would have to be filled out properly and accurately before SBC processes the request, just as is the case with orders for UNEs and other services that CLECs submit today to SBC. This approach could limit the number of unfocused or inaccurate requests that SBC receives, and would also require the CLEC to do more work on its own in order to obtain a termination charge calculation (thus addressing in part Ms. Kent's concern about CLECs purportedly engaging in costless "fishing expeditions" (SBC Ex. 5.0, pp. 10, 12)). (TDS Initial Br., p. 24)

Finally, SBC witness Ms. Kent expressed concern that given the growing volume of termination charge requests that SBC Illinois was experiencing, it is increasingly difficult for SBC to respond to those requests within three business days, as specified in the *ASCENT* Order. (SBC Ex. 5.0, pp. 6-7) However, TDS Metrocom states that it would not object if SBC's response time were increased to five business days/seven calendar days. TDS Metrocom would consider a one-week response time to be commercially reasonable from the perspectives of SBC, the customer and the CLEC. (TDS Initial Br., p. 24)

In summary, TDS Metrocom requests that the Commission direct (consistent with Finding (10) of the *ASCENT* Order) that for all multi-year contracts and tariffed plans for Usage, Centrex and Data/other services, SBC must provide to a CLEC a calculation of the termination liability to which a business customer taking service under the contract or tariffed plan would be subject if the customer terminated the contract or plan, upon presentation by the CLEC of written authorization from the customer to request and receive the termination charge calculation. TDS Metrocom states that to address the concerns SBC has expressed about having to provide termination charge calculations to CLECs possessing agency authorization from the customer, there are a variety of steps that SBC could take that would be less draconian and more competition-friendly than simply ceasing to provide these calculations to duly-authorized CLECs, and SBC is free to propose or implement such steps. (TDS Initial Br., pp. 24-25)

## V. TDS METROCOM'S REQUEST FOR REIMBURSEMENT OF FEES AND EXPENSES

TDS Metrocom requests that the Commission order SBC Illinois to reimburse TDS Metrocom for its out-of-pocket legal and other expenses incurred in connection with this proceeding. (TDS Metrocom only seeks reimbursement for external and out-of-pocket costs (such as photocopy expense), and not for internal costs such as the time of TDS Metrocom employees who worked on this proceeding. TDS Metrocom states that even if the Commission does not adopt either of TDS Metrocom's recommendations with respect to SBC's termination liability policies, it is clear that the filing of TDS Metrocom's Complaint prompted (or at least brought to much more rapid fruition) a comprehensive review and revision of SBC's termination liability policies. Although still problematic, SBC's revised termination liability policies are more consistent with the legal and competitive principles articulated by the Commission in the *ASCENT* Order, and will generally produce lower termination charges, than the types of provisions SBC previously employed. TDS Metrocom therefore concludes that by filing its Complaint and prosecuting this proceeding, TDS Metrocom has provided a benefit to customers and the competitive market. (TDS Initial Br., pp. 25-26)

TDS Metrocom points out that prior to the filing of TDS Metrocom's Complaint, SBC Illinois had in place hundreds (perhaps thousands) of multi-year agreements with business customers that included termination liability provisions requiring the customer to pay 50% to 100% of the customer's remaining revenue obligation under the contract in order to terminate. In contrast, the revised termination liability policies announced by SBC during the course of this proceeding (i) actually purport to be based on a calculation of the costs SBC experiences if a customer exercises early termination of a multi-year contract, and (ii) reduce the "percent of remaining revenue" percentages in SBC's contracts to 35% for Usage Services, 25% for Centrex Services and 50% for Data/Transport/other services, both for new contracts and retroactively for existing contracts. TDS Metrocom also emphasizes that in this proceeding, SBC did not attempt to justify and defend its previously-effective termination charge provisions, but rather responded to the Complaint primarily on the grounds that it is adopting revised termination liability policies. TDS Metrocom cites the testimony of SBC witness Mr. Gillespie, who stated after briefly describing SBC's "current" termination liability provisions:

> Q. Are these policies the relevant ones to be examining in this proceeding?
>
> A. No. As SBC Illinois indicated in its Amended Answer to TDS' Complaint and as TDS acknowledges in its testimony, SBC is in the process of modifying its early termination liability policies across-the-board. These modified policies will apply to all products and services offered under term agreements (whether tariffs or ICBs), and to both new and existing customers (although customers on term agreements today will only be charged the *lesser* of the early termination liability that applies under their existing agreement and the amount that would result from the new policy). Since these new policies will be in effect in the near future, they should be the focus of this proceeding, not the old policies that are being replaced. (SBC Ex. 1.0, p. 10; emphasis in original)

TDS Metrocom states that SBC did not devote any significant attention and resources to comprehensively reviewing and revamping its termination liability provisions into a consistent set of policies, with lower "percent of remaining revenue" charges, until prodded to do so by TDS Metrocom's Complaint. TDS Metrocom notes that SBC witness Mr. Gillespie candidly admitted in direct testimony, "I do not dispute that fact that the filing of the TDS' Complaint prompted SBC Illinois to take a hard look at its existing tariff and ICB practices"; and that he acknowledged that the TDS Complaint "accelerated a process that would have been undertaken at some point anyway, because it makes business and competitive sense." (SBC Ex. 1.0, p. 10)

Finally, TDS Metrocom points out that the cost studies presented by SBC witness Mr. Flitsch to support SBC's revised termination liability provisions were initiated on October 23, 2003, six weeks after TDS Metrocom's Complaint was filed, and completed on November 19, 2003. Further, the revised termination liability policies were actually implemented through tariffs filed by SBC in March 2004, some six months after TDS Metrocom's Complaint was filed. (TDS Initial Br., pp. 26-27)

TDS Metrocom states that the Commission has statutory authority to order SBC Illinois to reimburse TDS Metrocom for its external legal and other costs incurred in this proceeding. TDS Metrocom cites Section 13-516(a)(3) of the PUA (220 ILCS 5/13-516(a)(3)): "The Commission shall award damages, attorney's fees, and costs to any telecommunications carrier that was subject to a violation of Section 13-514." Section 13-514 is one of the statutory provisions on which TDS Metrocom's Complaint was based, and prohibits a telecommunications carrier from knowingly impeding the development of competition in any telecommunications services market, which TDS Metrocom states that SBC's prior termination liability provisions clearly did. (TDS Initial Br., pp. 27-28) TDS Metrocom states that the record in this proceeding is sufficient for the Commission to make findings (i) that SBC's previous termination liability provisions were unreasonable and anticompetitive, and (ii) that SBC adopted new termination charge provisions in response to TDS Metrocom's Complaint. (TDS Reply Br., p. 19) TDS Metrocom notes that it filed its Complaint alleging that SBC's termination liability provisions were unreasonable and anticompetitive because they violated the principles articulated by the Commission in the *ASCENT* Order. TDS Metrocom's Complaint identified specific SBC customer contracts that contained termination liability provisions that used the approach rejected by the Commission in the *ASCENT* Order and that produced termination charges so substantial that they dissuaded business customers that were otherwise interested in considering switching to TDS Metrocom from doing so. TDS Metrocom presented direct testimony supporting the specific allegations of the Complaint, as well as identifying an additional incident encountered by TDS Metrocom in which a customer contract included a termination charge provision of the type rejected in the *ASCENT* Order, and which produced a substantial termination charge. TDS Metrocom also provided additional evidence in its direct case, using information obtained through discovery, that SBC's use of similar termination charge provisions was widespread and that the termination charge provisions of which TDS Metrocom complained produced termination charges so substantial that they would make it uneconomic for the customer to consider switching, or for the CLEC to be able to pay the termination charge in order for the customer to switch. TDS Metrocom points out that its evidence showed that although SBC had hundreds of term contracts with business customers in place during the period 2001-2003 with termination charge provisions, virtually none of these contracts were terminated early. (TDS Reply Br., pp. 19-20)

TDS Metrocom points out that SBC did not respond substantively to TDS Metrocom's evidence concerning SBC's previous termination liability provisions, and made no attempt to defend the reasonableness of the previous termination liability provisions. Instead, SBC announced new termination liability provisions, and asserted that only its new policies, rather than its previously-employed provisions, should be evaluated by the Commission. Additionally, TDS Metrocom disputes SBC's assertion that since 2002, SBC's termination charges for Usage Services have ranged between 35% and 50% of remaining revenues under the contract. (SBC Initial Br. p. 33) TDS Metrocom notes that its Complaint was prompted by three contracts for usage services, encountered by TDS Metrocom in 2003, that provided for termination charges of

50% to 100% of the annual revenue commitment. Two of these contracts were entered into in 2002. Further, information provided to TDS Metrocom in discovery during 2003 showed additional usage contracts entered into in 2002 with 50% termination liability provisions plus usage contracts from earlier years still in effect in 2002 with higher termination liability percentages, up to 100%. (TDS Reply Br., p. 20)

TDS Metrocom also notes that Staff's evidence demonstrated the unreasonableness and anticompetitive nature of SBC's previous termination liability provisions. TDS Metrocom cites that summary of Staff's evidence from Staff's Initial Brief:

> Staff witness Mr. Omoniyi testified that SBC's pre-March 2004 termination liability policies had the following negative implications to customers, competing carriers and the public: First, a customer that terminates its agreement with SBC based on their current [i.e., pre-March 2004] termination penalty policies risks bearing a sizeable penalty that is not proportional to the actual loss that such customer caused SBC. Second, such customers are not likely to switch their services to a competing carrier (such as TDS Metrocom) even when the customer may be seeking a new telecommunications carrier. SBC's early termination policies, consequently, may create a chilling effect on customers. Finally, a situation in which customers cannot switch or are prevented from switching to another competing carrier will likely reduce the number of customers that all carriers can compete for in the marketplace. (Staff Initial Br., pp. 9-10 (citing Staff Ex. 1.0, pp. 8-9))

Additionally, referring to SBC's previous termination liability provisions, Staff pointed out that "a situation in which customers cannot switch their services as a result of the size of the penalties they would incur can only lead to those customers remaining with SBC. . . customers who cannot leave as a result of the high penalties will remain more or less captive customers to SBC." (Staff Initial Br., p. 10)

TDS Metrocom responded to SBC's assertion that in order to find a violation of 220 ILCS 5/13-514, the Commission must find that SBC's termination charge provisions were a "knowing" attempt to impede competition. (SBC Initial Br., p. 32) TDS Metrocom disputes any assertion that the Commission must find that SBC (or its personnel through which it acts) implemented the contractual termination charge provisions with a deliberate intent to impede competition. TDS Metrocom contends that it is sufficient if the acts or practices in question would have the likely effect of impeding competition and that this impact should have been obvious to those adopting or implementing the policies or practices in question. TDS Metrocom contends that inclusion of a termination liability provision that produces termination charges of the magnitude shown in the record of this case in long-term contracts with business customers has the obvious, likely impact of locking up these customers for the length of the contract term and making them unavailable to competitors as potential customers during that period. TDS Metrocom states that the adverse impact on competition is not just that the particular customers are removed from the available pool of business customers for which CLECs could compete during a particular time period. The more pernicious impact is that by shrinking the pool of available customers during the initial period of nascent competition, SBC's termination charge provisions made it much more difficult for individual CLECs to obtain the critical mass of customers, and the scale economies of operation, necessary to gain a foothold and remain in the Illinois telecommunications market. TDS Metrocom reiterates that the record shows that SBC's prior termination charge provisions were highly effective in preventing switching by business customers. (TDS Reply Br., pp. 21-22)

Thus, TDS Metrocom concludes that on the basis of the evidence presented by TDS Metrocom, which was essentially unrebutted by SBC, the Commission can find that the SBC termination charge provisions that motivated TDS Metrocom's Complaint and on which the Complaint was based were anticompetitive and unreasonable. Further, TDS Metrocom contends that the Commission can find, based on the sequence of events that unfolded in this case, that

SBC's adoption of new termination liability policies was motivated by TDS Metrocom's Complaint. TDS Metrocom states that while SBC asserts that the process to adopt new policies was already underway, there is no telling how long it would have taken to come to fruition had it not been for the impetus provided by TDS Metrocom's Complaint. (TDS Reply Br., p. 22)

TDS Metrocom responded to SBC's argument that any basis that TDS Metrocom has for recovery of fees based on SBC's prior termination liability provisions ended after SBC announced its new termination charge policies. (SBC Initial Br., p. 33) TDS Metrocom concedes that to the extent that its entitlement to reimbursement to fees and costs incurred in this case is based on bringing about the change in SBC's termination liability policies, that entitlement becomes weaker after SBC implemented its new policies. TDS Metrocom points out, however, that SBC's new termination liability policies were not in fact implemented until March 2004) Therefore, TDS Metrocom concludes, if the Commission determines that it is only entitled to reimbursement for costs and fees incurred in this case up to the point that SBC implemented its new termination liability provisions, the appropriate cut-off point is the above-referenced dates in March 2004. (TDS Reply Br., pp. 22-23)

Procedurally, TDS Metrocom proposes that the Commission's order direct SBC Illinois to reimburse TDS Metrocom for its external legal and related costs, and direct TDS Metrocom to submit a complete statement of the costs incurred to SBC with supporting documentation such as invoices. If SBC disputes any of the amounts and the parties are unable to resolve the dispute within 30 days, the parties should be allowed to bring the dispute before the Commission for resolution. (TDS Initial Br., p. 28)

## VI. PROPOSED FINDINGS AND ORDERING PARAGRAPHS

The Commission, having given due consideration to the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Complainant, TDS Metrocom, LLC, is a Delaware limited liability company engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(2) Respondent, Illinois Bell Telephone Company is an Illinois corporation engaged in the business of providing telecommunications services to the public in the State of Illinois and, as such, is a telecommunications carrier within the meaning of Section 13-202 of the Illinois Public Utilities Act;

(3) the Commission has jurisdiction over the parties and the subject matter of this proceeding;

(4) the recitals of fact and law and the conclusions reached in the prefatory portion of this Order are supported by the record, and are hereby adopted as findings of fact and conclusions of law for purposes of this Order;

(5) the services that are the subject of the Complaint filed herein and of this proceeding, and to which the findings, conclusions and ordering provisions of this Order apply, are (i) Centrex services, (ii) Usage services, provided pursuant to contracts or tariffs for Access/Usage, Master Discount Agreements, NETSPAN and Toll/800 services, and (iii) Data/Transport/other services, provided pursuant to agreements for DS0, DS1, DS3, ISDN Prime, ISDN Direct Multi-Service Opticxal Networks, "Giga-MAN", SONET and Ameritech Digital Transport

Service-Enhanced, in each base provided to business telecommunications customers pursuant to a contract or a tariffed calling plan with a term greater than 12 months (the "Subject Services");

(6) Illinois Bell Telephone Company's termination charge provisions in its contracts and tariffed calling plans for the Subject Services, as in effect in contracts and calling plans entered into prior to March 2004 (other than those contracts and tariffed calling plans specifically subject to the requirements of the *ASCENT* Order), were unreasonable within the meaning of, and in violation of, Section 9-250 of the Illinois Public Utilities Act, and constituted a knowing impediment to the development of competition in the local service telecommunications markets, in violation of Section 13-514 of the Illinois Public Utilities Act, to the extent that such termination charge provisions required the customer, upon terminating the contract or calling plan prior to expiration of its stated term, to pay a termination charge equal to a percentage of the customer's minimum annual or monthly revenue obligation for the remainder of the stated term of the contract or calling plan;

(7) Illinois Bell Telephone Company's termination charge provisions in its contracts and tariffed calling plans for the Subject Services, as placed into effect by Respondent in March 2004 (other than those contracts and tariffed calling plans specifically subject to the requirements of the *ASCENT* Order), are unreasonable within the meaning of, and in violation of, Section 9-250 of the Illinois Public Utilities Act, and constitute a knowing impediment to the development of

competition in the local service telecommunications markets, in violation of Section 13-514 of the Illinois Public Utilities Act;

(8) Respondent should revise the termination liability provisions in its contracts and tariffed calling plans for the Subject Services, as placed into effect by Respondent in March 2004 (other than those contracts and tariffed calling plans specifically subject to the requirements of the *ASCENT* Order) to provide that upon terminating such a contract or tariffed calling plan prior to expiration of its stated term, the customer shall be required to pay termination charges calculated by (i) subtracting the discounted charges the customer actually incurred during its term of service from the discounted charges the customer would have paid under a contract or tariffed calling plan with a term equal to the term the customer actually completed, plus (ii) any special construction charges, service activation or initiation charges, or similar nonrecurring charges that Respondent waived at the outset of the contract term in consideration of the customer entering into a contract with a term longer than 12 months;

(8.1) [Alternate if Commission does not accept Finding (8)] Respondent should revise the termination liability provisions its contracts and tariffed calling plans for the Subject Services, as placed into effect by Respondent in March 2004 (other than those contracts and tariffed calling plans specifically subject to the requirements of the *ASCENT* Order) to provide that upon terminating such a contract or tariffed calling plan prior to expiration of its stated term, the customer shall be required to pay a termination charge equal to no greater than 25% of the minimum annual or monthly revenue obligation specified in the contract or calling plan for the unexpired portion of its term;

(9) calculation of a termination charge, pursuant to the formula described in Finding (8), should be performed by Respondent upon termination of service by the customer or upon oral or written request from the customer, whichever occurs first, with respect to any contract or tariffed calling plan with the customer for the Subject Services; when such calculation is requested by a customer, it should be performed, and the results communicated to the customer, with three business days [alternate: within five business days]; the customer should be permitted to designate, in writing, a telecommunications service provider as an agent for the purpose of requesting and receiving such calculation; in the event of a dispute with respect to such calculation, the burden of proving the correctness of the calculation shall be on Respondent;

(10) Pursuant to Section 13-516(a)(3) of the Public Utilities Act, Illinois Bell Telephone Company shall reimburse TDS Metrocom, LLC, for TDS Metrocom, LLC's costs for external legal fees and out-of-pocket expenses incurred in connection with this proceeding; TDS Metrocom shall submit a statement of its reimbursable costs pursuant to this Finding (10), with supporting documentation; if Respondent and Complainant are unable to agree within 30 days after the date of such submission on the amount of reimbursable fees and costs to be paid to Complainant, either party may submit the dispute to the Commission for resolution; Respondent shall make payment of the reimbursable costs pursuant to

this Finding (10) within fourteen days after the parties reach agreement as to the amount or the Commission issues an order specifying the amount;

(11) any objection, motions or petitions filed in this proceeding that remain undisposed of should be disposed of in a manner consistent with the ultimate conclusions contained in this Order.

IT IS THEREFORE ORDERED that within 30 days after the date of this Order, Illinois Bell Telephone Company shall revise the contracts and tariffs described in Finding (5) to incorporate the termination liability provisions described in Finding (8).

IT IS FURTHER ORDERED that after the date of this Order, Illinois Bell Telephone Company shall not impose any termination charges in any contract or tariffed calling plan for the services described in Finding (5) other than the termination charges described in Finding (8).

IT IS FURTHER ORDERED that after the date of this Order, SBC Illinois shall adhere to the requirements, procedures and policies set forth in Finding (9).

IT IS FURTHER ORDERED that Illinois Bell Telephone Company and TDS Metrocom, LLC shall comply with Finding (10).

IT IS FURTHER ORDERED that all motions, petitions and objections made in this proceeding, which are not disposed of, be and are hereby disposed of consistent with the ultimate conclusions contained herein.

IT IS FURTHER ORDERED that subject to the provisions of Section 10-113 of the Public Utilities Act and 83 Ill. Adm. Code 200.880, this Order is final; it is not subject to the Administrative Review Law.

By order of the Commission this __ day of ______, 2004.

Respectfully submitted,

TDS METROCOM, LLC

by__________________________________

Owen E. MacBride
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5680
omacbride@schiffhardin.com

Its attorneys

Peter R. Healy
Manager CLEC External Relations
TDS Metrocom, LLC
525 Junction Road, Suite 6000
Madison, Wisconsin 53717
(608) 664-4117
peter.healy@tdsmetro.com